

IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

HOZAY ROYAL, :  
Plaintiff, : CIVIL ACTION  
v. : NO. 21-4439  
MACY'S CORPORATION, et al. :  
Defendants. :  
:

M E M O R A N D U M

EDUARDO C. ROBRENO, J.

MAY 11, 2022

Before the Court are two motions to dismiss pro se Plaintiff Hozay Royal's amended complaint, filed by Defendants Macy's Corporation and Upper Merion Township police detective Jay Nakahara.<sup>1</sup> Royal has not filed oppositions to the motions.<sup>2</sup>

For the reasons that follow, Nakahara's motion will be granted, and Macy's motion will be granted in part and denied in part.

**I. FACTUAL AND PROCEDURAL HISTORY<sup>3</sup>**

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<sup>1</sup> Royal's remaining claims against Nakahara are brought against Nakahara only in his individual capacity.

<sup>2</sup> The Third Circuit has held that motions to dismiss should not be granted solely because they are unopposed. Stackhouse v. Mazurkiewicz, 951 F.2d 29, 30 (3d Cir. 1991). Thus, the Court will consider the motions on the merits, especially given that Royal is pro se.

<sup>3</sup> The facts in the complaint are taken as true and viewed in the light most favorable to Swartz. DeBenedictis v. Merrill Lynch & Co., 492 F.3d 209, 215 (3d Cir. 2007).

Royal alleges that he was arrested by Nakahara on July 11, 2019 based on allegations from two Macy's employees, Gary Kinsey and Nicholas Redmond, that Royal stole goods from Macy's on February 21, 2019. He was also arrested at the same time for five other counts of retail theft from Macy's on other dates, as well as for a seventh count of receiving stolen property. After his arrest, he was released on bail.

Royal alleges that the retail theft charge for February 21, 2019 was withdrawn by the district attorney directly before his March 9, 2020 criminal trial on the remaining theft counts (for which the jury found him guilty).<sup>4</sup>

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<sup>4</sup> Macy's agrees that the February 21, 2019 retail theft count was withdrawn, while Nakahara contends that this count was not withdrawn and that Royal was actually convicted of the February 21, 2019 theft. Nakahara contends that, instead, the seventh count for receiving stolen goods was withdrawn. Both Defendants seek judicial notice of various documents from the criminal trial related to these assertions.

The Court takes judicial notice of the documents concerning Royal's retail theft trial and conviction, including the docket, criminal complaint, affidavit of probable cause, bill of information, and sentencing sheet as they are matters of public record and their accuracy cannot be reasonably questioned. See Fed. R. Evid. 201(b)(2); S. Cross Overseas Agencies, Inc. v. Wah Kwong Shipping Grp. Ltd., 181 F.3d 410, 413 (3d Cir. 1999) ("[W]e may take judicial notice of [a prior] opinion as a matter of public record.").

Regardless, however, for the purposes of these motions the Court will take as true Royal's allegation that the district attorney withdrew the February 21, 2019 retail theft count. Indeed, this appears to be the case in any event. The March 9, 2020 trial transcript indicates that the prosecution withdrew Count VII for receipt of stolen property and sought to withdraw the February 21, 2019 retail theft count, which was found in Count II, and replace it with a March 5, 2019 retail theft count. ECF No. 22-7 at 5-9. The trial court allowed the

During the March 9, 2020 trial on the remaining theft counts, Royal alleges that Kinsey and another Macy's employee, Bernard Bulos, testified that Macy's used a theft detection system called TrueVue to read radio frequency identification ("RFID") tags on the items allegedly stolen by Royal and to take pictures of Royal as he left Macy's. Kinsey and Bulos also allegedly produced a photo of Royal with a statement written on it "that the TrueVue system read that [Royal] had three pieces of cutlery in his shopping bag that was unpaid when he exited Macy's on February 21, 2019." Am. Complt. ECF No. 16 at 2.

Royal alleges that these employees perjured themselves and created false evidence because Royal contacted the manufacturer of the theft detection system which told him that the pedestals used at Macy's exits to read the RFID tags "only produce audio and visual alarms when there is a RFID reading . . ." Id. at 3. Royal claims that because there was no alarm on February 21, 2019, "there was no reading of an RFID event at all," presumably meaning that the Macy's employees fabricated the theft. Id.

Royal filed his case on October 8, 2021 and currently asserts the following counts in his amended complaint in

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substitution. Id. at 9. The trial transcript also clearly indicates that the February 21, 2019 theft was not part of the trial while the March 5, 2019 theft was. Thus, while Royal was convicted of Count II, the record makes clear that, by the day of trial, Count II no longer represented the February 21, 2019 theft.

connection with the February 21, 2019 count of retail theft that was ultimately withdrawn before trial: (1) false imprisonment against Nakahara; (2) malicious prosecution against Nakahara; (3) arrest without probable cause against Nakahara; (4) malicious prosecution against Macy's; (5) fabrication of evidence against Macy's; (6) perjury against Macy's; (7) detention without probable cause against Macy's; (8) "loss of society and familial based on fraud and perjury;" and (9) negligent supervision by Macy's of its employees in the loss prevention department. Id. at 4-5.

## **II. LEGAL STANDARD**

A party may move to dismiss a complaint for failure to state a claim upon which relief can be granted. Fed. R. Civ. P. 12(b) (6). When considering such a motion, the Court must "accept as true all allegations in the complaint and all reasonable inferences that can be drawn therefrom, and view them in the light most favorable to the non-moving party." DeBenedictis, 492 F.3d at 215 (internal quotation marks omitted).

To withstand a motion to dismiss, the complaint's "[f]actual allegations must be enough to raise a right to relief above the speculative level." Bell Atl. Corp. v. Twombly, 550 U.S. 544, 555 (2007). The pleadings must contain sufficient factual allegations so as to state a facially plausible claim for relief. See, e.g., Gelman v. State Farm Mut. Auto. Ins. Co.,

583 F.3d 187, 190 (3d Cir. 2009). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." Id. (quoting Ashcroft v. Iqbal, 129 S. Ct. 1937, 1949 (2009)).

### **III. DISCUSSION**

#### **A. Statutes of Limitations**

On July 11, 2019, Royal was arrested and briefly detained before being released on bail for, *inter alia*, the February 21, 2019 theft. Royal filed his original complaint on October 8, 2021.

Royal's claims for false imprisonment (Count 1), arrest without probable cause (Count 3), and detention without probable cause (Count 7) all arise from Royal's July 11, 2019 arrest. However, claims for false arrest and false imprisonment under Pennsylvania law are subject to a two-year statute of limitations. Kach v. Hose, 589 F.3d 626, 634 (3d Cir. 2009); see also Wallace v. Kato, 549 U.S. 384, 387-89, (2007) (concluding that false arrest claims mature at the time of the arrest and false imprisonment claims mature when the illegal imprisonment ends; and looking to state law for the applicable limitations period); 42 Pa. Cons. Stat. § 5524 (providing a two-year statute of limitations).

In that Royal filed his complaint more than two years after

July 11, 2019 (when he was arrested and released on bail), Counts 1, 3, and 7 of the amended complaint will be dismissed with prejudice as they are untimely.

Similarly, to the extent Royal is alleging in Count 9 negligent supervision in relation to the actions of Kinsey and Redmond on February 21, 2019 or July 11, 2019, that claim would be time-barred since negligent supervision also has a two-year statute of limitations. See Ormsby v. Luzerne Cty. Dep't of Pub. Welfare Off. of Hum. Servs., 149 F. App'x 60, 62 (3d Cir. 2005); Toy v. Metro. Life Ins. Co., 863 A.2d 1, 14 (Pa. Super. 2004), aff'd, 928 A.2d 186 (Pa. 2007). Thus, this aspect of Count 9 will be dismissed with prejudice.

#### **B. Negligent Supervision**

To the extent that in Count 9 Royal is alleging negligent supervision of Kinsey and Bulo in connection with their testimony during the March 9, 2020 trial, this claim fails.

To recover for negligent supervision under Pennsylvania law, a plaintiff must prove that:

his loss resulted from (1) a failure to exercise ordinary care to prevent an intentional harm by an employee acting outside the scope of his employment, (2) that is committed on the employer's premises, (3) when the employer knows or has reason to know of the necessity and ability to control the employee.

Belmont v. MB Inv. Partners, Inc., 708 F.3d 470, 487-88 (3d Cir. 2013). Negligent supervision also "requires the four elements of common law negligence, i.e., duty, breach, causation, and

damages." Id. at 488 (citing Brezenski v. World Truck Transfer, Inc., 755 A.2d 36, 42 (Pa. Super. 2000)).

First, the amended complaint fails to allege, *inter alia*, any action on March 9, 2020 that occurred in Macy's nor does it allege any actions outside the scope of any employee's employment. Second, since Royal alleges that the February 21, 2019 count was withdrawn before trial, the testimony provided by Kinsey and Bulos at the trial would not have been about that claim. Thus, any alleged malfeasance by Kinsey and Bulos during the trial cannot further Royal's negligent supervision claim regarding the February 21, 2019 theft arrest. Thus, this aspect of Count IX will be dismissed without prejudice.

### **C. Malicious Prosecution**

In Counts 2 and 4, Royal raises claims of malicious prosecution against Nakahara and Macy's respectively regarding the February 21, 2019 theft claim. Under Pennsylvania law, a plaintiff alleging malicious prosecution must show that: (1) the defendants initiated a criminal proceeding; (2) the criminal proceeding ended in the plaintiff's favor; (3) the proceeding was initiated without probable cause; and (4) the defendants acted maliciously or for a purpose other than bringing the plaintiff to justice. Cosmas v. Bloomingdales Bros., 660 A.2d 83, 85 (Pa. Super. 1995); Gatter v. Zappile, 67 F. Supp. 2d 515, 519 (E.D. Pa. 1999), aff'd, 225 F.3d 648 (3d Cir. 2000).

Royal arguably meets the first two requirements as to both Nakahara and Macy's since he alleged that the February 21, 2019 count of retail theft was withdrawn. See Restatement (Second) of Torts § 659(c) (providing that "[c]riminal proceedings are terminated in favor of the accused by," *inter alia*, "the formal abandonment of the proceedings by the public prosecutor"). Below, the Court will address the remaining two factors in connection with Nakahara and Macy's.

### **1. Nakahara (Count 2)**

Royal's complaint provides that Nakahara arrested Royal after Kinsey and Redmond, who worked in Macy's loss prevention department, alerted him to the alleged theft on February 21, 2019. Other than to allege in a conclusory fashion that the arrest was without probable cause and to allege that Nakahara did not observe Plaintiff on February 21, 2019, Royal does not allege a lack of probable cause.

Instead, the allegations in Royal's amended complaint, viewed as true and with all inferences drawn in his favor, indicate the existence of probable cause to arrest Royal based on the allegations Macy's relayed to him, regardless of whether those allegations were actually true. See Est. of Smith v. Marasco, 318 F.3d 497, 514 (3d Cir. 2003) (providing that "probable cause to arrest exists when the facts and circumstances within the arresting officer's knowledge are

sufficient in themselves to warrant a reasonable person to believe that an offense has been . . . committed" and that a court may find "that probable cause did exist as a matter of law if the evidence, viewed most favorably to Plaintiff, reasonably would not support a contrary factual finding" (quoting first Orsatti v. New Jersey State Police, 71 F.3d 480, 482 (3d Cir. 1995) and then Sherwood v. Mulvihill, 113 F.3d 396, 401 (3d Cir. 1997)); Sharrar v. Felsing, 128 F.3d 810, 818-19 (3d Cir. 1997) (providing that "[w]hen an officer has received his information from some person . . . who it seems reasonable to believe is telling the truth, he has probable cause" (quoting Grimm v. Churchill, 932 F.2d 674, 675 (7th Cir. 1991))). Royal also fails to ascribe any malicious motive to Nakahara. Thus, Count 2 against Nakahara will be dismissed without prejudice.

## **2. Macy's (Count 4)**

In relation to the malicious prosecution claim, Macy's merely argues that Royal cannot show that the February 21, 2019 theft claim was resolved in his favor when it was withdrawn because he was found guilty of the other retail thefts. Macy's provides no relevant support for this proposition and the Court concludes that the amended complaint adequately alleges that the February 21, 2019 claim was resolved in Royal's favor.

The Court further concludes that as a pro se plaintiff

whose pleading must be liberally construed,<sup>5</sup> Royal has adequately alleged that Macy's fabricated the February 21, 2019 theft and, knowing its falsity, prosecuted the case with malice up until the time the claim was withdrawn.<sup>6</sup> Thus, the Court will not dismiss Count 4 against Macy's. Discovery should readily show whether this claim has any merit.<sup>7</sup>

**D. Perjury and Fabrication of Evidence**

Counts 5, 6, and 8 of the amended complaint allege fabrication of evidence, perjury, and "loss of society and familial based on fraud and perjury." However, Pennsylvania does not recognize a private civil cause of action sounding in fabrication of evidence or perjury. See Ginsburg v. Halpern, 118 A.2d 201, 202 (Pa. 1955) ("Even if defendants had been shown to have volunteered to be witnesses and then [gave] false testimony against plaintiff [it] would not constitute a valid cause of action . . . . We believe there is no civil action for perjury .

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<sup>5</sup> See Erickson v. Pardus, 551 U.S. 89, 94 (2007) ("[A] pro se complaint, however inartfully pleaded, must be held to less stringent standards than formal pleadings drafted by lawyers.") (quoting Estelle v. Gamble, 429 U.S. 97, 106 (1976)).

<sup>6</sup> As discussed above in connection with the negligent supervision claim, any alleged misconduct by Kinsey and Bulos during the trial cannot further Royal's malicious prosecution claim regarding the February 21, 2019 theft since that claim was withdrawn before the trial.

<sup>7</sup> If the Court ultimately determines that Royal's claim is patently frivolous, the Court will entertain motions for sanctions against him under Federal Rule of Civil Procedure 11(b) & (c).

. . ."). Therefore, Counts 5, 6, and 8 of the amended complaint will be dismissed with prejudice.

**IV. CONCLUSION**

The Court will dismiss Counts 1, 3, and 7 (for false arrest/detention/imprisonment), as well as 9 (for negligent supervision regarding any events before October 18, 2019) with prejudice as they are time-barred. The Court will also dismiss Counts 5, 6, and 8 (for fabrication of evidence and perjury) with prejudice as they are not cognizable claims.

Count 9 (to the extent it relates to events after October 18, 2019) will be dismissed without prejudice as Royal has failed to make allegations that would support a claim of negligent supervision against Macy's. The Court will also dismiss Count 2 (for malicious prosecution) without prejudice in that Royal has, *inter alia*, failed to adequately allege that Nakahara acted without probable cause.

The Court will deny Macy's motion as to Count 4, and will not dismiss the malicious prosecution claim against Macy's. Thus, Count 4 is the sole surviving claim in the amended complaint. The Court will provide 30 days for Royal to file a second amended complaint amending any counts that are dismissed without prejudice, or to stand on his amended complaint and pursue only Count 4 against Macy's. If Royal does not file a second amended complaint by the deadline, the Court will

understand that he is standing on his amended complaint and will enter a scheduling order for the remaining claim, count 4 for malicious prosecution against Macy's.

An appropriate order follows.